INFORME AMICUS CURIAE
CORTE INTERAMERICANA DE DERECHOS HUMANOS
Caso Ángel Alberto Duque Vs. Colombia

La Comisión Internacional de los Derechos Humanos para Gays y Lesbianas
Centro Leitner por la Justicia y el Derecho Internacional

Zach Hudson
4/9/2015
**TABLE OF CONTENTS**

I. INTEREST OF AMICUS......................................................................................................................... 3

II. INTRODUCTION................................................................................................................................. 3

III. ARGUMENT.......................................................................................................................................... 4

   A. Equal Protection & Non-Discrimination: Right to Same Sex Partnership Benefits 4
      i. Regional Mechanisms .................................................................................................................. 5
         a. Inter-American System .............................................................................................................. 5
         b. European System ....................................................................................................................... 10
      ii. United Nations Mechanisms ..................................................................................................... 15
         a. UN Human Rights Treaty Monitoring Bodies ......................................................................... 15
         b. UN Human Rights Council ..................................................................................................... 21
         c. UN Special Procedures & Other UN Experts ............................................................................ 24
      iii. Domestic Jurisdictions ................................................................................................................. 27
         a. Same-Sex Partnership Recognition & Associated Rights ......................................................... 27
         b. Domestic Court Decisions ......................................................................................................... 32

   B. Fundamental Rights: HIV Status Related to Right to Health & Right to Life ...... 41
      i. Right to Health: Highest Attainable Standard .............................................................................. 42
      ii. Right to Life: Implications of Violations of Right to Health for Persons with a Life-Threatening Disease Such As HIV/AIDS ............................................................................. 49
      iii. Intersectionality & the Effects of Discrimination on Particularly Vulnerable Groups ............ 51
The International Gay and Lesbian Human Rights Commission ("IGLHRC") and the Leitner Center for International Law & Justice at Fordham Law School ("Leitner Center") respectfully submit this brief of amicus curiae in support of the application filed before the Inter-American Court of Human Rights (the “Court”) in the case of Angel Alberto Duque (the “Petitioner”).

I. INTEREST OF AMICUS

IGLHRC works to secure the full enjoyment of human rights for all people and communities subject to discrimination or abuse on the basis of sexual orientation, gender identity or expression, and/or HIV status. A U.S.-based nonprofit, non-governmental organization (“NGO”), IGLHRC affects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

The Leitner Center trains law students to become international legal experts and impassioned human rights advocates through its pioneering human rights programs, clinics, and education initiatives; facilitates capacity building and advocacy with local social justice organizations and activists around the world; and contributes to critical research among scholars in international human rights.

II. INTRODUCTION

IGLHRC and the Leitner Center submit this brief in support of a finding by the Court that Petitioner was discriminated against on the basis of his sexual orientation and denied access to fundamental rights when he was told he would be unable to access the
survivor’s pension of his deceased partner.\(^1\) In considering the admissibility of Mr. Duque’s petition, the Inter-American Commission on Human Rights found possible violations under the American Convention of Human Rights ("American Convention") of his right to humane treatment (Article 5), judicial guarantee and judicial protection (Article 8(1) and Article 25), and equal protection (Article 24) in conjunction with the Article 1(1) obligation not to discriminate on the basis of social condition, and the Article 2 obligation to enact measures to protect rights.\(^2\) The Inter-American Commission and the Inter-American Court have rightly recognized sexual orientation as among the social conditions protected from discrimination by Article 1.\(^3\) IGLHRC and the Leitner Center therefore urge the Commission to affirm that denial of spousal benefits to recognized same-sex partners constitutes discrimination on the basis of sexual orientation in violation of the Convention.

III. ARGUMENT

A. Equal Protection & Non-Discrimination: Right to Same Sex Partnership Benefits

Colombia is a State party to the American Convention on Human Rights and is accordingly bound to respect and ensure the rights guaranteed by this Convention. Colombia has also signed and ratified all nine of the major UN human rights treaties and

---


thus has a direct obligation under international law to abide by their terms.\textsuperscript{4} Under both the American Convention and the UN human rights treaties, discrimination based on sexual orientation is a violation of the human rights guarantees of these conventions and denying pension benefits based on sexual orientation constitutes such impermissible discrimination.

i. Regional Mechanisms

a. Inter-American System

Under Article 24 of the American Convention on Human Rights (“American Convention”), “[a]ll persons are equal before the law[; c]onsequently, they are entitled, without discrimination, to equal protection of the law.”\textsuperscript{5} Colombia, as a State Party to the American Convention, has agreed “to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status,


Furthermore, as a State Party to the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights ("Additional Protocol"), Colombia has further agreed to undertake to guarantee the exercise of those additional rights without discrimination of any kind for reasons related to those same categories. Finally, through its ratification of the American Convention and its Additional Protocol, Colombia is required to enact “such legislative or other measures as may be necessary” to give effect to those rights or freedoms guaranteed in these covenants.

The Organization of American States, particularly through the Inter-American Commission for Human Rights ("IACHR") and the Inter-American Court for Human Rights ("IACtHR"), has demonstrated a strong commitment to LGBTI equality. The Commission has explicitly stated that discrimination based on sexual orientation is incompatible with the American Convention, and has in recent years begun to develop jurisprudence on sexual orientation discrimination. The Commission has also expressed awareness at the severity of discrimination faced by many LGBTI people in states party to the Convention:

[T]he IACHR is deeply concerned about information it received regarding the situation of systematic discrimination and violence.

---

6 Id. at Art. 1
8 American Convention Art. 2; American Convention Additional Protocol Arts. 1 & 2.
9 See Atala Riffo Inter-Am. Ct. H.R. (ser. C) No. 239; See also Giraldo, Case 11.656, Inte-Am. Comm’n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 6 rev., ¶ 21 (admitting for a review a petition alleging an Article 11 (privacy) violation by a policy to disallow same sex intimate partner visitation rights); Homero Flor Freire v. Ecuador, Case 12.743, Inter-Am. Comm’n H.R., Report No. 81/31, ¶ 167 (2013) (holding that a policy to discharge homosexuals from the military was a violation of Articles 24 (equal protection), 8 (fair trial), and 25 (judicial protection)); Luis Alberto Rojas Marín v. Peru, Case 446.09 Inter-Am. Comm’n H.R. Report No. 99/14 ¶ 59-60 (2014) (admitting for review a petition alleging violations of Articles 5 (humane treatment), 7 (personal liberty), 8 (fair trial), 11 (respect for honor and dignity), 24 (equal protection), and 25 (judicial protection)).
against lesbian, gay, bisexual, trans, and intersex persons (LGBTI) in the region...the IACHR also received information about serious acts of violence and hate crimes perpetuated against the LGBTI community in countries of South America and Central America...The Inter-American Commission has decided to intensify its efforts to defend the rights of LGBTI persons...

As part of its efforts to protect LGBTI individuals, IACHR has issued a number of Article 25 Precautionary Measures—emergency requests to a state to prevent harms and protect the lives of LGBTI persons. The Commission has also frequently issued press releases in support of LGBTI rights and condemning homophobic violence; has made an issue of LGBTI human rights violations in every annual report it has released since 2008; and has held a series of hearings focused on the situation of LGBTI persons in member states. In 2011, IACHR developed a strategic plan to focus on the rights of

LGBTI persons and established the *Unit on the Rights of LGBTI Persons* to prepare reports and to monitor human rights violations in member states. As of 2013, this Unit was converted into a full Rapporteurship, headed by Commissioner Tracy Robinson. In addition to the responsibilities first conferred on the LGBTI Rights Unit, the Rapporteur is mandated to receive and process petitions alleging violations related to sexual orientation, gender identity, and gender expression.

In particular, IACHR has recognized the forms of discrimination faced by LGBTI persons in Colombia. In 2009, the Commission held a special session on the situation of LGBTI human rights violations in Colombia, which documented the violence, arbitrary arrests, and poor enforcement of rights of LGBTI persons by the courts. In 2011, the Commission also included in its Annual Report its concern about discrimination faced by LGBTI persons in Colombia, but praised Colombia for extending partnership rights such that same-sex couples enjoy “the same pension benefits, social security benefits and property rights that heterosexual couples enjoy.” However, when the instant case concerning Angel Alberto Duque was before IACHR, the Commission stated that,

---


despite the strides that Colombia has made in granting these equal benefits, these steps occurred after the facts of Mr. Duque’s case, and the State has an obligation to ensure that he too is granted access to the pension and social security benefits that should be available to all couples.  

Functionally, governments have an interest in the promotion of committed adult relationships, an interest which has traditionally been promoted through the recognition of marriage and legal benefits for married couples. Such relationships are often, whether they include children or not, viewed as a form of family. The Inter-American Court has also acknowledged that “the concept of family life is not limited only to marriage and must encompass other de facto family ties in which the parties live together outside of marriage,” and has ruled that Article 17 applies to non-traditional families as well as traditional ones. The Court’s reasoning in Atala Riffo v. Chile is in line with a large body of international legal decisions which have recognized that, when determining the rights of couples and families, courts should not look only to legal frameworks such as marriage but rather should determine why a government chooses to confer benefits on that group and whether same-sex couples and non-traditional families are appropriately analogous. Laws written to include spouses, de facto married couples, and families

---

21 American Convention, supra note 6, at Art. 17, (“The right of men and women of marriageable age to marry and raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.”) (recognizing both the right to marry and the right to raise a family as protected rights under Article 17). See also Inter-American Court of Human Rights, Case of Atala Riffo and Daughters v. Chile. Merits, Reparations, and Costs. Judgment of February 24, 2012. Series C No. 239. paras. 166, 167, 168 (finding a woman, her same sex partner, and their children constitute a family unit protected by Article 17).
22 See Atala Riffo Series C No. 239 at para. 142
23 Id., paras. 166 - 168.
24 See Looking for a Family Resemblance: The Limits of the Functional Family Approach to the Legal Definition of Family, 104 HARV. L. REV. 1640, 1641 (1991) (arguing that, while many courts have used a formalistic definition of words like “spouse,” “parent,” or “family,” other courts have recognized that such terms should be interpreted to include family structures outside the traditional nuclear family that are
should be read to include non-traditional relationships that are analogous by virtue of being a “stable and significant” relationship “between consenting adults.”

b. European System

The European Court of Human Rights (the “ECtHR”), the regional body that oversees human rights in Europe, has been at the forefront of recognition for LGBT rights. The Court has also been at the forefront of recognition that denying same-sex partners equal benefits is a form of discrimination. In 2003, the ECtHR decided Karner v. Austria, considering whether refusing to apply a law—allowing a spouse, family member, or life companion to retain tenancy rights following the death of said partner—to a same sex couple was discrimination under Articles 8 and 14 of the European Convention on Human Rights (the “European Convention”). Article 8 of the European Convention protects the right to privacy, including the right to home life and to “private and family life.” The right to privacy enshrined in Article 8 had previously been applied to protect the right to same-sex relationships. In Karner, that right was examined in conjunction with Article 14, which prevents status discrimination interfering with other

---

25 Id. at 1651, 1654 (recognizing that same-sex partners are in an analogous situation to married couples, and arguing that couples that deviate from the traditional model in as or more significant ways are still defined as spouses or family, such as childless couples, couples who keep their finances apart, or couples in a relationship that does not involve sexual intercourse).


aspects of the European Convention.\(^{29}\) The ECtHR’s decision recognized that sexual orientation discrimination prevented the applicant from enjoying protected rights under the ECHR\(^{30}\)

Like the Inter-American Commission and Court, the ECtHR also clearly views same-sex couples as a social category comparable to heterosexual couples.\(^{31}\) In *Kozak v. Poland*, in a decision directly analogous to the facts of the Angel Alberto Duque petition, the Court found inappropriate discrimination exists when a law provides benefits only to couples in a “*de facto* marital cohabitation” rather than life companionship where same-sex couples did not enjoy the right to marry and could not be in a *de facto* marital relationship.\(^{32}\) The ECtHR also ruled that when a policy distinguishes between couples based on sexual orientation, a clearer rationale than the protection of the traditional family must exist. Under Article 8:

[R]espect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status, and relational issues, including the fact that there is not just one way or one choice in the sphere of

\(^{29}\) Council of Europe, European Convention on Human Rights art. 14, Nov. 4 1950, 5 C.E.T.S. 5, 13; See also European Court of Human Rights, Judgment of Dec. 21, 1999, Salgueiro da Silva Mouta v. Portugal, No. 33290/96, para. 28 (finding that sexual orientation is a ground that is “undoubtedly covered by Article 14 of the Convention”). Note that while the European Convention Article 14 protects status discrimination, it only operates in conjunction with other rights of the convention; unlike the American Convention, the European Convention contains no independent right to equal protection and freedom from discrimination.

\(^{30}\) *Karner*, Application No. 40016/98, at paras. 33, 43. Note that the case was ultimately decided as a violation of the right to the home rather than as a violation of the right to family life; despite this distinction, ECtHR has ruled that any discrimination that may affect a protected right such as family life is impermissible if it is purely on the basis of sex or sexual orientation and there is no substantial justification.

\(^{31}\) See European Court of Human Rights, Judgment of April 29, 2008, Burden v. United Kingdom, No. 13378/05 (distinguishing the situation of cohabiting sisters from the situation of same sex couples). See also European Court of Human Rights, Decision as to the Admissibility of Courten v. United Kingdom, Nov. 4 2008, No. 4479/06; European Court of Human Rights, Decision as to the Admissibility of M.W. v United Kingdom, June 23, 2009, No. 11313/02 (distinguishing in both cases the situation of same sex couples from *Burden* for the purposes of tax and pension benefits, but denying on admissibility grounds because of the United Kingdom’s 2004 Civil Partnership Act).

\(^{32}\) European Court of Human Rights, Judgment of March 2, 2010, Kozak v. Poland, No. 13102/02, paras. 40, 96-99 (rejecting the argument that a same sex couple could not be *de facto* married because same sex marriage is not recognized in Poland, and instead finding the distinction was sexual orientation based discrimination).
leading and living one’s family or private life.\textsuperscript{33}

In its decision, ECtHR explicitly recognized committed, cohabiting same-sex relationships as a form of family life protected by the European Convention to the same degree as heterosexual relationships.\textsuperscript{34} Following the Court’s logic, while governments are given discretion to determine exact definitions of what type of family qualifies for which benefits, those distinctions should not be due to a prohibited ground for discrimination such as sexual orientation.\textsuperscript{35}

The European Court of Human Rights has clearly and consistently held that same sex couples are entitled to the same benefits and family rights as heterosexual couples in the same legal situation – unmarried same sex couples must have the same status as unmarried heterosexual couples. Indeed, in the case of \textit{X and Others v. Austria}, ECtHR stated that it is a violation of the European Convention for States to treat unmarried same-sex couples differently than unmarried heterosexual couples with respect to adoption.

\textsuperscript{33} \textit{Id.}, paras. 98, 99.
\textsuperscript{34} European Court of Human Rights, Judgment of June 24, 2010, Schalk and Kopf v. Austria, No. 30141/04, paras. 94-95 (deciding there is no right to same-sex marriage under Article 8 and 14 because these rights must be read in context of Article 12, which defines marriage as between a man and a woman).
\textsuperscript{35} \textit{Id.}, para. 96. It should be noted that the Court has not always been consistent in its interpretation of this principle. In the recent case of \textit{Gas and Dubois v. France}, the Court ruled that a law restricting partner adoption rights to married couples (where marriage was not permitted for same-sex couples) was not discriminatory because it treated unmarried heterosexual and homosexual couples the same way. It based its decision on a previous ruling determining that Article 12’s right to marry only applies to opposite sex couples, and that extends to the rights included in marriage. However, this analysis has never been applied by the IACtHR to its interpretation of the same rights guaranteed by the American Convention. The Inter-American Commission has always recognized that indirect discrimination, or discrimination that has the effect of a discriminatory impact on a fundamental right—regardless of legislative intention, falls under the Convention’s definition of discrimination. Even if the Inter-American Court chose to read same sex spousal benefits as part of the right to marriage rather than the right to privacy or to family life, which would be a view inconsistent with previous decisions, under the American Convention such a distinction would still be impermissible under Article 24, which guarantees equality under the law. The European Convention has no such guarantee, and therefore all matters of discrimination must be decided by the application of Article 14 in conjunction with another right. Under the American Convention, a law that leads to direct or indirect discrimination is inherently impermissible. It is likely the facts of \textit{Gas and Dubois} would have led to a different outcome if interpreted under the American Convention.
rights.\textsuperscript{36} To do otherwise would be a violation of the rights to privacy and family life possessed by all LGBT individuals.\textsuperscript{37}

While the ECtHR has been the primary regional human rights body for LGBTI anti-discrimination jurisprudence, in recent years the European Union ("EU") and its highest court, the European Court of Justice ("ECJ"), has also demonstrated a commitment to LGBT rights.\textsuperscript{38} In the previous decade, the European Union has taken action to prevent discrimination on the basis of sexual orientation. In 1999, when the Treaty of Amsterdam went into effect, Article 6 of the Treaty Establishing the European Community was amended to allow the European Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."\textsuperscript{39} Article 13 was also added as a general non-discrimination clause. On the basis of Article 13, the Council subsequently established Council Directive 2000/78/EC, which included sexual orientation as a prohibited ground in employment.\textsuperscript{40} Discrimination based on sexual orientation is also prohibited by Article 21 of the Charter of Fundamental Rights.\textsuperscript{41}

The European Court of Justice has also applied anti-discrimination to same-sex employment benefit equality. In the case of \textit{Maruko v. VddB}, the European Court of

\textsuperscript{36} European Court of Human Rights, Judgment of February 19, 2013, X and Others v. Austria, No. 19010/07 (in English) (distinguishing from its holding in \textit{Gas and Dubois})
\textsuperscript{37} See Karner, No. 40016/98 at para. 43; Kozak, No. 13102/02 at para. 99.
\textsuperscript{38} See Inequalities and multiple discrimination in access to and quality of healthcare. European Agency for Fundamental Human Rights, 7 (2013).
\textsuperscript{39} Treaty of Amsterdam, Oct. 2, 1997, art. 2.7
\textsuperscript{40} Council Directive 2000/78/EC, Nov. 27, 2000, Official Journal L 303 at 16-22 (However, it should be noted that the Directive explicitly excluded social security schemes and social protection schemes where the benefits are not treated as income [including pension benefits; furthermore, application of the Directive has focused on racial and sexual discrimination, effectively creating a hierarchy of grounds for anti-discrimination action that privileges race and sex over religion and belief, age, disability, and sexual orientation.
\textsuperscript{41} European Union, Charter of Fundamental Rights of the European Union, C 364/1 Official Journal of the European Communities 13, Art. 21
Justice reviewed pension differences for same-sex couples under its Directive 2000-78/CE (Employment Discrimination) and found that if, under national law, life partners are in an equivalent relationship to married couples, then exclusion from a pension fund would be an impermissible form of discrimination. The ECJ (now CJEU) later clarified its position in Römer v. Freie, noting that in order for partnership recognition to be viewed as granting the rights and benefits of marriage, “it is not required that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out...in a specific and concrete manner in light of the benefit concerned.”

Therefore, the ECJ guarantee of equality applies not only to recognized partnerships that were intended to be exactly like marriage, but any partnership that confers marriage-like benefits. Neither decision holds that a Government must recognize same sex relationships, but instead establishes that if a State has established legal recognition for same-sex partnerships, exclusion of those forms of partnership from rights and benefits granted to married couples is discriminatory. Maruko and Römer both demonstrate that equal access to spousal benefits is a well-recognized aspect of equality.

Recent cases have built upon these rulings. For example, in Hay v Crédit agricole mutual, the CJEU similarly interpreted Directive 2000-78/CE to bar collective bargaining agreements from including provisions discriminating against same sex partnerships, even where same-sex partnership recognition is not equivalent to heterosexual marriages.

---

42 See Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I – 1757, paras. 63-73 (deciding petitioner is eligible for pension benefits if life partnerships are comparable to marital unions, but leaving that decision ultimately to discretion of German courts).


ii. United Nations Mechanisms

The United Nations Human Rights Bodies have held that discrimination based on sexual orientation violates human rights. For nearly twenty years, the UN system has repeatedly affirmed the right of LGBT individuals to live free from discrimination.

a. UN Human Rights Treaty Monitoring Bodies

As noted above, Colombia has signed and ratified all nine of the major UN human rights treaties and thus must abide by their terms. The monitoring bodies for the majority of these treaties have made explicit reference to protections against discrimination on the basis of sexual orientation. As a leader in human rights and international law, the United Nations and treaty body decisions represent significant persuasive authority, and have frequently been relied upon in Inter-American Court decisions.


these treaty bodies are also binding authority.

In terms of specific provisions relevant to this case, Colombia is a State Party to the International Covenant on Civil and Political Rights ("ICCPR"), the International Convention on Economic, Social, and Cultural Rights ("ICESCR"), the Convention on Ending All Forms of Discrimination Against Women ("CEDAW"), the Convention on the Rights of the Child ("CRC"), and the Convention on the Rights of Persons with Disabilities ("CRPD")—and has adopted all of these conventions into domestic law.\textsuperscript{47}

Many of the references to sexual orientation throughout the UN system initially stem from the Human Rights Committee’s ("HR Committee") landmark decision of \textit{Toonen v. Australia} in 1994.\textsuperscript{48} In \textit{Toonen}, the HR Committee addressed the equality provisions contained within the ICCPR.\textsuperscript{49} Article 2 of the ICCPR, similar to Article 1 of the American Convention, states that:

\begin{quote}
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{50}
\end{quote}


\textsuperscript{48} Toonen v. Australia, Communication No. 488/1992, U.N. Doc PR/C/50/D/488/1992 (1994) (holding that a Tasmanian law criminalizing consensual sexual contact between men was not "essential to the protection of morals in Tasmania" and arbitrarily interfered with the petitioner’s rights under Article 17 of the ICCPR (right to privacy)).

\textsuperscript{49} Id., paras. 8.1, 8.7.

The HR Committee found that this provision of the ICCPR “is to be taken as including sexual orientation.”\(^5\) Since *Toonen v. Australia*, references to the protection from discrimination on the basis of sexual orientation have been included in General Comments and Recommendations by the Committee on the Rights of the Child (the “CRC Committee”);\(^52\) the Committee Against Torture (the “CAT Committee”);\(^53\) the Committee on the Elimination of All Forms of Discrimination Against Women (the “CEDAW Committee”);\(^54\) and the Committee on Economic, Social and Cultural Rights (the “CESCR”).\(^55\)

The United Nations and associated treaty bodies, including the CEDAW Committee, and the CESCR, all recognize not only the right to freedom of discrimination on the basis of sexual orientation, but the corresponding right to same-sex partnership recognition that confers benefits equal to what is available to married couples. For example, the HR Committee, which oversees application of the articles of ICCPR, has

\(^54\) See e.g., General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, EDAW/C/2010/47/GC.2; General Recommendation No. 27 on Older Women and Protection of Their Human Rights, EDAW/C/2010/47/GC.1. “The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity... States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.”
explicitly and consistently ruled that committed same-sex couples are entitled to benefits equal to those of their heterosexual counterparts. The HR Committee has frequently issued recommendations to state parties to expand the available forms of legal recognition available to same-sex couples and afford the same partnership benefits to same-sex couples as it affords to heterosexual couples.56 For instance, in its concluding observations to Ireland in 2008, the HR Committee urged Ireland to provide legal recognition for same sex couples that was not “discriminatory of non-traditional forms of partnership, including taxation and welfare benefits.”57

The HR Committee has gone further in its commitment to same-sex partnership rights in its decisions with respect to complaints submitted under the Optional Protocol to the ICCPR.58 The ICCPR stipulates in Article 26, that “all persons are equal before the law and are entitled without any discrimination to equal protection before the law.”59 In Young v. Australia, the HR Committee applied Article 26 to government pensions, ruling that denying pensions on the basis of sexual orientation is discriminatory.60 The HR Committee reached the same conclusion in the 2007 case of X v. Colombia. In that case, a surviving partner was denied his deceased partner’s pension, which was deemed to be a

57 CCPR/C/IRL/CO/3 at 8.
58 The Optional Protocol for the International Covenant on Civil and Political Rights establishes a complaint mechanism whereby the Committee can hear complaints against a States Party that falls under the rights guaranteed by the Covenant. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. OP1-ICCPR (Dec. 16, 1966). Colombia ratified the protocol in 1969 with no reservations, and is therefore eligible to have complaints reviewed by the Committee.
60 Young v. Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (Aug. 12 2003) (finding that denying a veteran’s pension to a surviving same sex partner would be discrimination where the pension would have been available to a surviving opposite sex partner).
violation of Article 26. Notably, the HR Committee also considered whether previous jurisprudence—examining whether distinctions between unmarried and married heterosexual couple benefits are permissible—would also apply in the case of a same-sex couple. The Committee notes that if same-sex couples cannot legally make the choice to marry in a jurisdiction, the justification that marital status distinctions are non-discriminatory is not applicable. Therefore, if a state does not provide the option of marriage to same-sex couples, then it must provide the full legal benefits of marriage to committed same-sex couples regardless of legal status.

Angel Alberto Duque’s partner passed away prior to recognition of same-sex partnerships in Colombia, so under the HR Committee’s interpretation of Article 26, Colombia should treat his partnership as comparable to a heterosexual marriage. Failing that, Colombia must at least conform to X v. Colombia’s explicit ruling that treating unmarried same-sex partnerships differently from unmarried heterosexual partnerships is discriminatory, and recognize that he meets the pension eligibility of a permanent partner in a de facto marital union.

The CESCR has also clearly required that state parties not discriminate on the basis of sexual orientation with respect to partnership benefits. Article 9 of the ICESCR guarantees individuals the right to social security and social insurance. Social security must include health care, disability and sickness benefits, family and child support

---

62 See X v. Colombia, U.N. Doc. CCPR/C/89/1361 at paras. 7.2, 7.3 (noting in its rejection of different benefit regimes between heterosexual and same sex couples that previous decisions that the previous jurisprudence may not apply. However, the Committee declines to definitely rule on this issue.)
63 Id.
64 See REPORT No. 150/11 PETITION 123-05 ADMISSIONÁLAngel Alberto Duque COLOMBIA, 7, November 2, 2011.
benefits, and survivors’ pensions. With respect to survivors’ pensions, the CESCR is clear, as stated in its General Comment 19, that both formal and de facto discrimination in receiving and accessing such pensions is impermissible, stating:

Survivors or orphans must not be excluded from social security schemes on the basis of prohibited grounds of discrimination and they should be given assistance in accessing social security schemes, particularly when endemic diseases, such as HIV/AIDS, tuberculosis and malaria, leave large numbers of children or older persons without family and community support.

A prohibited ground for discrimination under the ICESCR is defined as “direct or indirect” discrimination on the grounds of civil, political, or social statuses including sexual orientation. Therefore, parties to the ICESCR must provide social security including sickness and survivor benefits to same-sex couples equivalent to benefits available to heterosexual couples, and must also assist surviving partners in accessing the benefits to which they are entitled.

Under the ICESCR, Mr. Duque is entitled to the social security scheme of his deceased partner as both an adult dependent (Section 18) and as a survivor (Section 21). While this will be discussed in greater detail in a later section, it is also worth noting here that, as a person living with HIV/AIDS, Mr. Duque is exactly the type of vulnerable community member to which the CESCR is referring.

The CEDAW Committee has also long recognized that discrimination based on sexual orientation is a form of discrimination. In Concluding Observations made to states party to the Convention following Committee reviews, CEDAW has often

---

67 Id., paras. 13, 14, 18, 20, 21.
68 Id., paras. 21.
69 Id., paras. 29, see also Economic and Social Council, General Comment No. 20 (2009): Non-discrimination in economic, social, and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc E/C.12/GC/20 (2 July 2009) para. 32 (defining sexual orientation as a recognized “other status,” and asserting that “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights.”)
70 CEDAW General Recommendation 28, 2010, para. 18, “The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.” ; see also Karen Atala & Daughters v. Chile, Case 12.502, Inter-Am. Ct. H.R., CDH-S/2092 (2011)(ruling by the IACHR that custody could not be award to the father solely based on the mother’s identification as a lesbian).
addressed unequal access to rights by lesbian, bisexual, and transgender people.71 While the CEDAW Committee has not specifically addressed LGBT partnership rights, it has viewed unequal access to family benefits based on different family types, such as single motherhood, as discriminatory.72 Because CEDAW does not permit discrimination based on type of family, and because the CEDAW Committee views discrimination based on LGBT status as impermissible, the CEDAW Convention should be read to require equal access to spousal benefits regardless of sexual orientation.

b. UN Human Rights Council

The UN Human Rights Council (“HRC”) has repeatedly condemned discrimination based on sexual orientation. At the third session of the UN Human Rights Council in 2006, fifty-four states banded together to issue the “Joint Statement on Human Rights Violations Based on Sexual Orientation and Gender Identity,” condemning human rights violations based on sexual orientation and calling upon the UN HRC to take action.73 Then in 2011, eighty-five states joined the “Joint Statement on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity,” demonstrating the trend in state condemnation of human rights violations based

71 See Id., “States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences...”; See also, e.g., U.N. CEDAW, 49th Sess., Costa Rica at 40, 41, U.N. Doc. CEDAW/C/CRI/CO/5-6 (Aug. 2, 2011) (requiring LBT people have equal access to services); U.N. CEDAW, 51st Sess., Norway at 35, 36, U.N. Doc. CEDAW/C/NOR/CO/8 (March 9, 2012) (Requiring LBT people have equal access to health care); U.N. CEDAW, 46th Sess., Argentina at 43, 44, U.N. Doc. CEDAW/C/ARG/CO/6 (July 30, 2010) (requiring complete equality for LBT people in fact even when equality is guaranteed by law).


on sexual orientation.\textsuperscript{74}

On June 17, 2011, the HRC passed the landmark UN Resolution A/HRC/17/L.9/Rev.1 on “Human Rights, Sexual Orientation and Gender Identity” which condemned violence and discrimination based on sexual orientation or gender identity. The resolution states:

\textit{Expressing grave concern at} acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity . . . [the HRC] [d]ecides to convene a panel discussion during the 19th Session of the Human Rights Council, informed by the facts contained in the study commissioned by the High Commissioner and to have constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.\textsuperscript{75}

Most recently, on September 26, 2014 the HRC redoubled its denunciation of violence and discriminatory treatment on the basis of sexual orientation and gender identity in a new resolution that garnered the support of two additional States and with five fewer States voting against the 2014 resolution than the 2011 resolution.\textsuperscript{76}

In its latest Universal Periodic Review (“UPR”) cycles, the HRC has also considered human rights violations based on discriminatory treatment of LGBT persons at every one of its sessions.\textsuperscript{77} These recent UPR sessions demonstrate that the HRC is committed to analyzing states’ records of discrimination based on sexual orientation and gender identity as an integral part of the examination of their human rights records. These

\textsuperscript{74} \url{http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1368.html}.

\textsuperscript{75} UN Resolution A/HRC/17/L.9/Rev.1, Human Rights, Sexual Orientation and Gender Identity, available at \url{http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1417.html}.


\textsuperscript{77} For the Final Reports of the UPR Working Group from UPR Sessions 1–20 see Final Reports + Add.–UPR Info, \url{http://www.upr-info.org/-Final-outcome-.html}; for the Final Reports of the UPR Working Group from UPR Session 21 see Documentation, \url{http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx}.
actions in the HRC demonstrate the commitment of the Council and of Member states to recognize and eradicate discrimination based on sexual orientation.

HRC has also argued for the protection of the right to committed partnership benefits for same-sex couples. In March 2012, at the direction of the HRC, the UN High Commissioner on Human Rights issued a report detailing the status of LGBT persons in human rights law. The report stated that while international law does not require same sex marriage, it does require that unmarried same-sex couples and unmarried heterosexual couples be treated in the same way with respect to benefits such as “pension entitlements, the ability to leave property to a surviving partner, the opportunity to remain in public housing following a partner’s death, or the chance to secure residency for a foreign partner.” Furthermore, HRC also recognized the need to address the discrimination inherently created when same-sex couples are not allowed the choice to marry:

Lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can also result in same-sex partners being discriminated against by private actors, including health-care providers and insurance companies.

By touching on this issue, the HRC recognizes that if a state does not provide an avenue for legal recognition of same-sex partnerships, then discrimination may result even if policies treat same-sex and opposite sex unmarried couples the same way.

---


79 U.N. Doc. A/HRC/19/41
c. UN Special Procedures & Other UN Experts

The UN Special Procedures, independent experts who address either thematic or country-specific issues, have similarly condemned human rights violations on the basis of sexual orientation. The Special Rapporteurs on housing, \(^80\) education, \(^81\) the independence of lawyers and judges, \(^82\) racism, \(^83\) freedom of religion or belief, \(^84\) human rights defenders, \(^85\) violence against women, \(^86\) minorities, \(^87\) health, \(^88\) migrants, \(^89\) torture, \(^90\) terrorism, \(^91\) extrajudicial executions, \(^92\) freedom of peaceful assembly and association, \(^93\) and freedom of opinion and expression, \(^94\) along with country-specific rapporteurs and the working groups on arbitrary detention \(^95\) and mercenaries, \(^96\) have all issued statements

---

\(^80\) Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, United States, A/HRC/13/20/Add.4 (Feb. 12, 2010).
\(^81\) Report of the Special Rapporteur on the Right to Education, Bosnia and Herzegovina, A/HRC/8/10/Add.4 (May 27, 2008)
\(^83\) Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Estonia, A/HRC/7/19/Add.2 (Mar. 17, 2008)
\(^84\) Report of the Special Rapporteur on Freedom of Religion or Belief, United Kingdom of Great Britain and Northern Ireland, A/HRC/7/10/Add.3 (Feb. 7, 2008)
\(^90\) Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nigeria, A/HRC/7/3/Add.4 (Nov. 22, 2007).
\(^92\) Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Guatemala, A/HRC/11/2/Add.7 (May 4, 2009)
\(^95\) Report of the Working Group on Arbitrary Detention, Colombia, A/HRC/10/21/Add.3 (Feb. 16, 2009)
related to human rights violations based on sexual orientation or gender identity.

Many high-ranking UN officials have also made statements admonishing discrimination based on sexual orientation as a human rights violation. UN Secretary-General Ban Ki-moon has stated unequivocally that every country must ensure equal rights for all people, regardless of sexual orientation or gender identity. Navi Pillay, the UN’s High Commissioner for Human Rights from 2008 until 2014, has consistently affirmed that discrimination based on sexual orientation is a recognized violation of international human rights law. For example, in a speech to the International Gay and Lesbian Human Rights Commission, Commissioner Pillay said:

[I]n speaking up for the rights of those who are lesbian, gay, bisexual, transgender or intersex, we are not calling for the recognition of new rights or trying to extend human rights into new territory. We are simply reinforcing what the UN human rights treaty monitoring bodies and human rights rapporteurs have confirmed repeatedly: existing international law protects everyone from violence and discrimination, including on grounds of their sexuality or gender identity. 98

Zeid Ra’ad Al Hussein, the newly appointed High Commissioner as of September 2014, has continued the expression of support for LGBTI rights from the Office of the High Commissioner on Human Rights OHCHR. 99 He has specifically condemned the

96 Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination [transgender/gender identity hate crimes], Peru, A/HRC/7/7/Add.2 (Feb. 4, 2008)
As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity . . . . Yes, we recognize that social attitudes run deep. Yes, social change often comes only with time. But let there be no confusion: where there is tension between cultural attitudes and universal human rights, rights must carry the day.
99 High Commissioner Al Hussein has said:
There is no justification ever, for the degrading, the debasing or the exploitation of other human beings – on whatever basis: nationality, race, ethnicity, religion, gender, sexual orientation, disability, age or caste.
use of widely held homophobic attitudes as a justification for governments to permit or participate in discrimination based on sexual orientation, stating:

 Governments have a duty to protect people from prejudice, not to add to it. Public hostility towards gay and lesbian people can never justify violating their fundamental human rights. Instead, it requires increased measures to protect them against human rights violations. This has been reaffirmed by UN human rights mechanisms…. 

These statements are only the beginning of the OHCHR’s work in denouncing mistreatment of LGBT persons. In 2013, OHCHR launched a massive multimedia public education campaign on LGBT human rights called Free & Equal. The campaign is intended to raise awareness about violence and discrimination against LGBT individuals and to promote respect for their rights.

By denying Angel Alberto Duque access to survivor’s pension benefits, the State of Colombia has acted in complete contradiction to the words and efforts of the UN human rights experts. It has drawn an unjustifiable distinction between Mr. Duque and other heterosexual surviving partners, simply on the basis of his sexual orientation. Statements from UN human rights treaties, the UN Human Rights Council, and UN human rights bodies and experts make clear that UN bodies consistently espouse the same message: discrimination based on sexual orientation is a violation of human rights. The range and depth of the UN’s commitment to this fundamental principle establish that discrimination based on sexual orientation in receiving a survivor’s pension benefit

should be strictly prohibited.

iii. Domestic Jurisdictions

a. Same-Sex Partnership Recognition & Associated Rights

In recent years, a rapidly growing number of legislatures have legalized same-sex marriage or have created same-sex partnerships offering many of the rights of marriage. The first country to recognize civil partnerships was Denmark in 1989. This quickly became a trend throughout much of Europe and the world. Recognition has taken the form of the extension of cohabitation rights to same-sex couples (also often known as common law or de facto marriage), the creation of separate forms of legal recognition (often known as registered partnerships, domestic partnerships, or civil unions) that may vary dramatically in their similarity to marriage, and the opening of marriage to same-sex couples. All such forms of recognition serve to expand the rights of same-sex couples and insure a measure of equality, but a clear trend has emerged towards acceptance that forms of recognition should mirror marriage as closely as possible.

Same-sex marriage has long been a dramatic statement in favor of equality, and an efficient way to avoid gaps in equality often present in even the most well meaning

104 See Patrick Festy and Godfrey Rogers, Legal Recognition of Same Sex Couples in Europe, 61.4 POPULATION (ENGLISH ED.) 417, 419 (2006).
105 Id., See also Kees Waaldijk, More or Less Together: Levels of Legal Consequences for Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners: A Comparative Study of Nine European Countries, INSTITUT NATIONAL D’ÉTUDES DÉMOGRAPHIQUES, 192, para. 9 (2005) [hereinafter More or Less Together] (analyzing the differences in level of recognition and legal protection in the registered partnerships of several European countries).
registered partnership regime. The Netherlands, in 2001, was the first country in the world to provide same-sex marriage. The decision to allow same-sex marriage was in response to a request to Parliament to expand the existing civil partnerships in order to provide fuller equality.\(^{106}\) Part of the reasoning for providing marriages rather than registered partnerships was that there was no law protecting differing treatment between married and unmarried persons, regardless of sexual orientation, so same-sex partners were often denied full pension equality.\(^{107}\) The Netherlands was followed by Belgium in 2003, where same-sex marriage opened rights such as partner inheritance and tax equality that had previously been unavailable for same-sex couples.

A number of countries soon followed the Netherlands’ example. Now same-sex marriage has been passed through the legislative process or by court order by a number of countries throughout the world: Belgium (2003),\(^ {108}\) Spain (2005),\(^ {109}\) Canada (2005),\(^ {110}\) South Africa (2006),\(^ {111}\) Norway (2009),\(^ {112}\) Sweden (2009),\(^ {113}\) Portugal (2010),\(^ {114}\) Iceland


\(^{110}\) Supreme Court OKs Same Sex Marriage, CBC NEWS CAN., Dec. 10, 2004, http://www.cbc.ca/news/canada/story/2004/12/09/scoc-gaymarriage041209.html; Canada Approves Gay Marriage, THE GUARDIAN, June 29, 2005,://www.guardian.co.uk/world/2005/jun/29/gayrights; Festy and Rogers supra note 110, at 419. As justification for the decision, then Prime Minister Paul Martin said, “It is important that you don’t cherry pick rights,” recognizing that same-sex marriage was a means for providing rights and freedom from discrimination for same-sex couples.

\(^{111}\) See Fourie and Another v Minister of Home Affairs and Another [2004] ZASCA 132, 2005 (3) BCLR 241 (SCA), 2005 (3) SA 429 (SCA) (30 November 2004), Supreme Court of Appeal (South Africa)
Argentina (2010),

Denmark (2012),

Brazil (2013),

France (2013),

Uruguay (2013),

New Zealand (2013),

Luxembourg (2015),

Finland (2015; entry into force 2017),

Ireland (2015 by national referendum with entry in force 2015/2016), and, most recently, the United States (2015).

Several other countries offer same-sex marriages in at least some of their jurisdictions. In Mexico, same-sex marriage is legal and performed in Mexico City and in

---


113 Id.


four other states; in addition, courts in all states must approve marriage licenses for same-sex couples, and all states must recognize same-sex marriages performed anywhere within Mexico and all associated fundamental spousal rights such as alimony payments, inheritance rights, and the coverage of spouses by the federal social security system. In 2014 in the United Kingdom, same-sex marriage also became legal in England, Wales, and Scotland.

Allowing same-sex marriage is the simplest way to ensure same-sex unions are treated in the same way as heterosexual unions, but where nations and legislatures have not wished to take this step, many have at least provided partnerships or unions to same-sex couples that guarantee the same (or, in many cases, similar) protections as marriage. In 2015, the International Lesbian, Gay, Bisexual, Trans, and Intersex Association (“ILGA”) identified twelve nations where legal partnership frameworks (e.g. civil partnerships, registered partnerships, civil unions, etc.) provide all or most of the legal protections provided by marriage.


128 See More or Less Together, supra note 111 at 9 (Table O analyses the relative benefits of marriage, partnership, and cohabitation recognitions as compared to heterosexual marriage. With the exception of the Netherlands, all registered partnership regimes provided fewer legal protections than marriage, but Nordic countries surveyed provided protections close to that of marriage, and all provided protections significantly greater than cohabitation. Note that this study took place prior to the adoption of same-sex marriage by several countries surveyed).

129 ILGA, supra note 104; More or Less Together, supra note 113.

130 ILGA, supra note 104. It is also worth noting that most of the first nations, especially in Europe, that now offer same-sex marriage initially offered partnership recognition, demonstrating a trend toward the eventual provision of marriage equality; examples include Denmark, Sweden, Iceland, Norway, and the Netherlands. [See Festy and Rogers supra note 110, at 419.]
The Americas are no exception to this continuing trend of recognizing same-sex partnerships; and even outside of legal partnership recognition, many countries in this region recognize same-sex couples’ rights. As discussed above, Argentina, Brazil, Canada, the United States, Uruguay, and many states within Mexico all now provide same-sex marriage. But even before legalizing same-sex marriage, many of these same countries offered same-sex marriage in some jurisdictions or civil partnerships of some kind at a national level.\textsuperscript{131} And, in addition to Colombia, there are other countries in the Americas that currently provide for some sort of civil partnership. For example, Ecuador’s Constitution, adopted in 2008 following a referendum on its contents, created civil unions, and Article 68 grants couples who share a home and a “stable and monogamous relationship” the rights of marriage irrespective of gender except for the purposes of adoption.\textsuperscript{132} In April 2015, Chile also legalized civil unions for same-sex couples, with the law coming into effect six months later.\textsuperscript{133}

Even if a country does not yet officially recognize same-sex partnerships through marriage or civil unions, many still at least recognize the right of LGBT individuals to access their partner’s benefits. For example, before offering same-sex marriage, Argentina’s National Social Security Administration resolved to allow same-sex couples

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{133} Robert Kozak, \textit{Chile’s President Signs Law Allowing For Same-Sex Civil Unions}, \textsc{Wall St. Journal}, April 13, 2015, http://www.wsj.com/articles/chiles-president-signs-law-allowing-for-same-sex-civil-unions-1428953566.
\end{itemize}
\end{footnotesize}
who had lived together for five years to collect their deceased partner’s pension.\textsuperscript{134} Prior to allowing civil unions and same sex marriage, Uruguay recognized cohabiting couples who had been together for five or more years as equal with respect to pension rights.\textsuperscript{135} In Brazil in 2010, the INSS made permanent a rule recognizing pensions in the case of the death of a same-sex partner; the Ministry said this rule has existed in practice since 2000.\textsuperscript{136} In Ecuador, the Social Security Institute [IESS] began granting survivor pension benefits following a petition brought by a woman who had lost her partner.\textsuperscript{137} In Mexico, the Chamber of Deputies approved reforms to IMSS and ISSSTE—Mexico’s health care programs—that benefit same-sex partners; in addition, Mexico has approved amendments to social security law that include medical and social benefits for same-sex partners.\textsuperscript{138}

b. Domestic Court Decisions

- **Relevant Jurisprudence from States Parties to American Convention**

While legislative initiatives in some other countries show a clear trend towards recognition of same-sex couple protections, in the Americas, much of the progress has


been made through progressive court bodies ruling against discrimination. In many nations, it is the role of the courts to ensure rights, freedom from discrimination, and equal protection within the boundaries of the court’s constitutional powers when the legislature has failed to do so.\textsuperscript{139} Courts that recognize the human rights of LGBTI people have often been the guarantors of same-sex partnership benefits.

In Latin America, many advances in partnership recognition have been made through the courts and through institutions changing policy through the adjudication of complaints. Similarly, courts have also protected those fundamental rights such as social security benefits which are associated with that partnership recognition. Colombia, Brazil, and Mexico all have some recognition at a national level for same-sex couples, but in each case the recognition came about through court decision prior to or instead of legislative initiatives.

For example, in Mexico, following Mexico City’s decision to allow same-sex marriage, the Mexican Supreme Court ruled that the other states of Mexico must recognize marriages performed there.\textsuperscript{140} In 2013, the Mexican Supreme Court also struck down as unconstitutional a law banning same sex marriage in the state of Oaxaca.\textsuperscript{141} In striking down the law, the court extended the Inter-American Court’s decision in \textit{Atala Riffo v. Chile} to same sex marriage bans, writing that \textit{Atala Riffo} requires the rejection of

\textsuperscript{139} \textit{See} Nicholas Bamforth, \textit{Same-sex Partnerships: Some Comparative Constitutional Lessons}, 1 E.H.R.L.R. 47, 60-65 (2007) (arguing that where courts have approved increased same-sex rights worldwide, they have acted appropriately within their judicial role and have generally been respectful where there is conflict with another right such as religious belief.)


“a regime of separate-but-equal marriage.” The court noted that the absence of same-sex marriage benefits “is a direct result of the continuing discrimination that has existed for homosexual couples because of their sexual preference.”

In Brazil, several court cases have been instrumental in establishing partnership rights. As early as 1996, the Court of Justice in the State of Rio de Janeiro found an implied partnership between same-sex partners “taking into consideration, above all, the solidarity evidenced by one of the partners towards the other, who was infected with HIV.” In 2010, a court in Rio de Janeiro heard the case of a man who was denied access to a survivor pension following the death of his partner, and ruled that this would be discriminatory and benefits should be given. In 2011, the Supreme Constitutional Court heard two cases on the Stable Union Law, which gave many of the rights and benefits of marriage to cohabiting heterosexual couples but excluded same-sex couples. The Tribunal held that same-sex couples should be considered “family entities” under the law for the purposes of benefits, welfare, assistance, and leave, and include same-sex couples when the state makes provisions for permanent partnerships.

143 Inconstitucional Normas de Sinaloa Que Excluye a Las Parejas del Mismo Sexo: Primera Sala, SUPREMA CORTE DE JUSTICIA DE LA NACION (Apr. 15, 2015), http://www2.scjn.gob.mx/red2/comunicados/noticia.asp?id=3072 (“La ausencia de los beneficios que el derecho asigna a la institución matrimonial es una consecuencia directa de la prolongada discriminación que ha existido hacia las parejas homosexuales por razón de su preferencia sexual.”).
144 Marcelo Déaltry Turra, Brazil’s Proposed “Civil Unions Between Persons of the Same Sex” Legislative Inaction and Judicial Reactions, in LEGAL RECOGNITION OF SAME SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 337, 342 (Robert Wintemute & Mads Andenas eds., 2001).
National Council of Justice of Brazil voted to give fuller effect to its May 2011 decision, extending civil marriage rights to same sex couples nationwide.\footnote{Mariana Oliveira, \textit{Decisão do CNJ obriga cartórios a fazer casamento homosexual}, Globo, May 14, 2013, \url{http://g1.globo.com/politica/noticia/2013/05/apos-uniao-estavel-gay-podera-casar-em-cartorio-decide-cnj.html} (in Portuguese); note that the National Council’s decision represented the first judicial extension of marriage rights in South America.}

Argentina has long been a leader in recognizing the rights of same-sex partners. Although same-sex marriage was authorized by the Argentinean legislature, Attorney General Esteban Righi had previously filed a brief in support of marital rights.\footnote{Argentina: Attorney General files Supreme Court brief in favor of same-sex couples, \textit{BLABBEANDO}, Aug. 9, 2009, \url{http://blabbeando.blogspot.com/2009/08/argentina-attorney-general-files.html#.UAlntHlXos1}.} One of the first national institutions to hear cases of pension discrimination against same-sex couples was the Argentinean National Institute Against Discrimination (\textquote{INADI\textquoteright}), a national body that hears and assists in cases of discrimination.\footnote{Support for Discrimination, INADI, available at \url{http://inadi.gob.ar/asistencia/#asistencia-tramite}.} INADI argued in favor of pension rights for same-sex couples,\footnote{\textit{Para INADI es discriminatoria negativa de pension por viudez a homosexual}, \textit{PÁGINA 12}, July 5, 2007, \url{http://www.pagina12.com.ar/diario/ultimas/20-87655-2007-07-05.html}.} and determined that the National Administration of Social Security (\textquote{ANSES\textquoteright}) had been discriminatory in denying a man pension benefits after his partner passed away.\footnote{\textit{El INADI ratificó que rechazar una pension por ser gay es discriminatorio}, \textit{DIARIO JUDICIAL}, July 16, 2008, \url{http://www.diariojudicial.com/contenidos/2008/07/17/noticia_0004.html} (in Spanish).} Later that year, ANSES began giving pensions to same-sex couples.\footnote{Graciela Gioberchio, \textit{Parejas gay: ya otorgaron las primeras pensiones por viudez}, \textit{CLARÍN}, Sep. 2008, \url{HTTP://EDANT.CLARIN.COM/DIARIO/2008/09/06/SOCIEDAD/S-01754565.HTM}.} Local courts have also been effective. In 2009, the Supreme Court of the province of Buenos Aires ruled in favor of pension benefits for same-sex couples.\footnote{Suprema Corte de Justicia [SCJ] [Court of Justice], 28/7/2009, \textquote{Yapur Elvio c. Caja de Prevision y Seg. Medico / recurso de hecho}, S.C. Y.36.XLIII (Arg.).} More recently, the Argentinean National Supreme Court heard the case of Mr. \textit{P}, a man who had been in a \textquote{loving relationship, with public companionship,}}
fidelity, and mutual assistance” with his partner, who died. ANSES denied Mr. P a pension, but the Court held that the law was intended to cover situations where there was economic dependence, so ANSES could not ignore this circumstance and deny rights to same-sex couples. Interestingly, the Court also applied international law—interpretations of Article 25 of the Universal Declaration on Human Rights and Article 9 of the ICESCR. By applying international agreements, Argentina recognizes that all parties to these agreements should provide these services to everyone, without discrimination on the basis of sexual orientation.

And of course, a wealth of Colombian case law itself has found that same-sex couples like Mr. Duque and his partner may not be subjected to discriminatory practices. A series of recent Constitutional Court decisions found that existing laws governing marital property protections, social security and health benefits, and pension benefits should be read to include same-sex couples cohabiting or in civil unions. These cases read existing laws to include same-sex partners, indicating that partnerships such as Mr. Duque’s should be read as retroactively valid. A 2009 case went further, ruling that

---


“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.” (emphasis added)


157 See Sentencia C-075/07, (Rejecting a law’s definition of a de facto couple for purposes of community property as a man and a woman, and upholding the law so long as same-sex partners are included); Sentencia C-811/07 (Holding health care intended to cover families and common law companions should be read to include same-sex partners), and Sentencia C-336/07 (Upholding survivor benefits for permanent companions with the understanding that permanent companionship includes same-sex partners).

158 See Sentencia C-811/07, and Sentencia C-336/07.
over forty laws must be read to include same-sex couples.\textsuperscript{159} In addition to reading same-sex couples into existing laws, the Court also ruled that the Instituto de Seguros Sociales [Institute of Social Insurance] and the Caja Nacional de Previsión Social [National Social Security Fund] acted discriminatively by not granting benefits to survivors of same-sex partners,\textsuperscript{160} and that administrators of pension funds may not deny recognition based on sexual orientation.\textsuperscript{161} The Court also decided the case of a Colombian man “AA,” whose partner passed away, and who was unable to access life insurance. The Court ruled that this was a violation of his rights, although AA, similarly to Mr. Duque, had never had his relationship legally recognized as his partner passed away before this was possible.\textsuperscript{162} The Court rightly recognized the seriousness of AA’s action, stating that HIV/AIDS status, in Colombia, is considered to exacerbate need for a remedy.\textsuperscript{163} Despite this clearly analogous decision, Mr. Duque has still been denied his rights.

\textbullet \textbf{Relevant Jurisprudence from Non-States Parties}

In the United States, same sex marriage is now legal throughout the country following a June 2015 Supreme Court decision, \textit{Obergefell v. Hodges}.\textsuperscript{164} Prior to this decision, a number of individual states offered same-sex marriage through legislation or court decision;\textsuperscript{165} this occurred for the first in the United States in 2003, when the Supreme Judicial Court of Massachusetts held the State of Massachusetts’s Constitution

\footnotesize
\textsuperscript{159} See Sentencia C-029/09.
\textsuperscript{160} See Corte Constitutional [C.C.] [Constitutional Court] 2011, Sentencia T-716-11 (Colom.)
\textsuperscript{161} See Corte Constitutional [C.C.] [Constitutional Court] febrero 2, 2010 Sentencia T-051-10.
\textsuperscript{162} See Corte Constitutional [C.C.] [Constitutional Court] noviembre 15, 2011, Sentencia T-860-11 (Colom.)
\textsuperscript{163} \textit{Id.}
\textsuperscript{165} \textit{Id. at }9.
guaranteed the right to marry.\textsuperscript{166} Ten years later in 2013, and after many other states had subsequently begun to legalize same-sex marriage, the U.S. Supreme Court then invalidated relevant sections of a national piece of legislation, the 1996 \textit{Defense of Marriage Act}—which barred the recognition of same-sex marriage at a federal level even for those couples who were legally able to wed in their individual state.\textsuperscript{167}

In the recent June 2015 \textit{Obergefell} opinion, the majority finally legalized same-sex marriage throughout the nation, noting:

Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.\textsuperscript{168}

The Court based its reasoning in large part on the precedent set by a 1967 case, \textit{Loving v. Virginia}, in which the Court unanimously invalidated bans on interracial marriage, holding that marriage is “one of the personal rights essential to the orderly pursuit of happiness by free men.”\textsuperscript{169} The Court found that, like in the \textit{Loving} case, there are fundamental rights that must be protected under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution—among them the fundamental right to marry itself, but also the right to personal choice as relates to the concept of personal autonomy; the right to privacy; and rights related to family life.\textsuperscript{170} Furthermore, the Court went on to connect marriage as a “keystone of our social order” with the related governmental rights, benefits, and responsibilities which attach to marriage: taxation; inheritance and property

\textsuperscript{166}Id.; see also \textit{Goodridge v. Department of Public Health}, 440 Mass. 309, 798 N.E. 2d 941 (2003).
\textsuperscript{167} See Id. (Obergefell); see also United States v. Windsor, 570 U.S. __ (2013).
\textsuperscript{168} Id.(Obergefell).
\textsuperscript{169} Id. at 11; see also \textit{Loving v. Virginia}, 388 U.S. 1, 12 (1967).
\textsuperscript{170} Id. (Obergefell) at 12-16.
rights; rules of intestate succession; hospital access; medical decision-making authority; health insurance; and the “rights and benefits of survivors.”  

Finally, in its analysis, the Court found that denying same-sex partners the right to marry was a violation of both the Due Process Clause and the Equal Protections Clause of the U.S.’s Constitution’s Fourteenth Amendment, saying:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central aspects of equality. Here the marriage laws enforced...are in essence unequal: same-sex couples are denied all of the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits the unjustified infringement of the fundamental right to marry.”  

While Canada began providing the right to same-sex marriage through its legislature, Canadian courts have also issued protections to same-sex couples. Before Canada made same-sex marriage available on a national level the Canadian Supreme Court had already ruled that same-sex couples were entitled to equal treatment, including pension benefits. In the 1999 Supreme Court case *M. v. H.*, a woman filed for spousal support from her former partner under the Family Law Act, which required such support for cohabiting but unmarried opposite sex couples. The Court determined that the word “spouse” should be read to include same-sex couples to the same extent it included opposite-sex unmarried couples.  

Thus, in addition to legislative support, the Canadian courts have been ensuring rights for same-sex couples for an extended length of time.

---

171 *Id.* at 17.
172 *Id.* at 22.
In the United Kingdom as early as 1999, the House of Lords ruled that a same sex partnership could be considered a form of family, and therefore a partner had the right to succeed to the tenancy of his deceased partner.\(^{174}\) In a later case, the House of Lords also wrote that “[a] homosexual couple whose relationship is marriage-like in the same ways that an unmarried heterosexual couple’s relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based on their sexual orientation.”\(^{175}\)

Because the Constitution of South Africa explicitly protects from discrimination based on sexual orientation, the courts have long been a mechanism to expand LGBT rights in the country.\(^{176}\) In 1999, the National Coalition for Gay and Lesbian Equality successfully challenged laws providing immigration benefits to spouses that were not extended to same-sex couples.\(^{177}\) This case was groundbreaking as one of the earliest cases to recognize that giving preferential treatment to married couples without any avenue for inclusion for same-sex couples is, in fact, discrimination on the basis of sexual orientation. This important decision was followed by decisions ruling that same-sex and married couples should not be distinguished for the purpose of government employee pensions,\(^{178}\) and eventually that marriage should be available to same-sex couples.\(^{179}\)

While other constitutions have not explicitly recognized freedom from discrimination on the basis of sexual orientation, any constitution, as well as the American Convention, that protects discrimination on the basis of social status including sexual orientation, should be subject to the same reasoning the South African Constitutional Court used in *NCGLE*


\(^{177}\) *NCGLE* 1999 ZACC 17, at paras. 25, 30, 31 (S. Afr.).

\(^{178}\) Satchwell, 2002 ZACC 18, at paras. 20 - 26 (S. Afr.).

\(^{179}\) Minister of Home Affairs v. Fourie 2005 ZACC 19 (CC 2005) (S. Afr.)
v. Minister of Home Affairs and prohibit discrimination that favors married heterosexual couples over same-sex life partners.

**B. Fundamental Rights: HIV Status Related to Right to Health & Right to Life**

Parallel to the argument that Duque has been discriminated against because of his sexual orientation, Colombia has also failed to adequately secure Duque’s fundamental right to health— and even his right to life. Colombia has a positive obligation to ensure that every individual is able to achieve the highest attainable standard of health. Colombia also has both positive and negative obligations with respect to the right to life. States must refrain from taking a life outside of certain limited circumstance and they must also affirmatively act to protect against the loss of life. The right to health—and the right to life to some degree—are meaningless protections without requiring a state’s positive obligations, and those obligations must take into account the particular needs and vulnerabilities of different populations. In other words, it is not enough to just provide general access to health services for its population, but a state must also ensure that a person with, for example, a life-threatening disease like HIV/AIDS has adequate and effective access to appropriate medical care and services to ensure that highest attainable standard. It is immaterial that the direct discrimination to which Duque was subjected was related to his sexual orientation and not specifically his HIV status, or that an HIV+ person who was heterosexual would have been able to access her/his partner’s pension benefits. The Inter-American Commission has always recognized that indirect discrimination, or discrimination that has the effect of a discriminatory impact on a
fundamental right—regardless of legislative intention, falls under the Convention’s
definition of discrimination.\textsuperscript{180} The impact of the discrimination Duque experienced was
exacerbated by his HIV/AIDS status. Sexual orientation is certainly not a proxy for HIV
status determination; however, in looking to the impact of the discrimination, the Court
should look to the entirety of the circumstances and the intersection of Duque’s sexual
orientation and HIV+ status.

i. Right to Health: Highest Attainable Standard

The Colombian General Social Security Health System was overhauled in 1994 to
create a dual track system, with a contribution-based regime—which includes
COLFONDOS—for workers who historically received increased benefits, and a
subsidized regime for individuals who fell below certain poverty limits or otherwise
could not afford care.\textsuperscript{181} An individual who cannot afford the payments to their EPS is

\textsuperscript{180} See Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs,
even without proof of discriminatory intention is discrimination under Art. 24 (equal protection)); See also
Permanent Council of the Organization of American States: Committee on Juridical and Political Affairs,
Presentation by Dr. Leonardo Hidaka, Meeting of March 9, 2010, pp. 4-6, OEA/Ser.G CAJP/GT/RDI-INF.19/10
available at http://www.oas.org/dil/CAJP-GT-RDI-INF_19-10_eng.pdf (summarizing the
Organization of American State’s history on indirect discrimination); Organization of American States,
Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with
Disabilities, Article 1.2.a, June 17, 1999, AG/RES. 1608 (XXIX-O/99) (defining discrimination to include
distinctions and restrictions with the effect of a discriminatory impact); Organization of American States,
Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, March 13,
2009, Principle II (defining discrimination to include distinctions with the effect of limiting enjoyment of
rights). Dr. Hidaka also rightly argues that CEDAW Article 1 and Human Rights Committee General
Comment No. 18, to which all American Convention parties are party to, also define discrimination in this
way. See CEDAW art. 1; HRC General Comment No. 18.

\textsuperscript{181} See Article 157 of Law 100 of 1993; see also IAHRC Report No. 5/14, Case 12,841, para. 45.; see also
Regimen Contributivo en la Seguridad Social, Gerencie.com (Oct. 9, 2013) (The contribution-based health
regime [also known as the private or contributive regime] comprises dozens of health provider enterprise,
termed EPS [Entidad Promotora de Salud] of which individuals select one that will provide health
coverage. A retired individual receiving a pension must contribute 12% of their monthly pension to their
selected EPS; see also http://www.gerencie.com/regimen-contributivo-en-la-seguridad-social.html (The
forced to seek health coverage through the subsidized regime. Significant health disparities have existed between individuals receiving care through the contributive and the subsidized regimes. In 2001, a study of health outcomes under the separate regimes in Bogota found that individuals living with HIV enrolled in the subsidized regime had a mortality rate 3.3 times higher than individuals living with HIV enrolled in the contributive system. A study conducted in 2009 of individuals living with HIV/AIDS in Colombia found that individuals who received their healthcare through the contributive system—through SAFPs such as COLFONDOS—reported having a higher quality of life compared to those receiving care through the subsidized regime. The study noted:

Those affiliated to a contributive healthcare regime had better-quality services; presenting fewer financial concerns, fewer symptoms of depression, received antiretroviral therapy, and experienced lower frequencies and intensities of symptoms; they also evidenced fewer antecedents of sexual or physical abuse.

An additional study undertaken in 2009, of individuals living with HIV/AIDS in Colombia also found that quality of life was higher for individuals accessing care through the contributive regime. The study noted, “in health conditions, it was observed that in all private pension system comprises several pension administrators, termed AFPs [Sociedades Administradoras de Fondos de Pensiones], of which Colfondos [Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías] is one of several competing AFPs—an individual receiving a pension from an AFP designates which EPS they are affiliated with and directs the AFP to provide payment to that EPS to continue coverage.

182 Rubby Marcela Martínez Bejarano, Equidad en Salud. Un Análisis Desde la Mortalidad Diferencial por Régimen de Aseguramiento. Bogotá 2001, at 10 (Universidad Externado de Colombia 2006) (“La mortalidad por enfermedad por VIH muestra una tasa 3,3 veces mayor en el grupo de edad de 15 a 44 años; 2,4 veces mayor en el grupo d edad de 45 a 59 años y casi dos veces mayor en el grupo de mayores de 60 años del régimen subsidiado.”), available at http://www.abep.nepo.unicamp.br/site_eventos_alap/PDF/ALAP2004_378.PDF.

183 Claudia Patricia Valencia , Gladys Egenia Canaval, Diana Marin & Carmen J. Portillo, Quality of Life in Persons Living with HIV–AIDS in Three Healthcare Institutions of Cali, Colombia, Colombia Médica, Vol. 41, No. 3 (2010), available at http://colombiamedica.univalle.edu.co/index.php/comedica/article/view/706/1166 (“The bivariate analysis per healthcare regime (type of insurance) revealed that individuals in the contributive regime had a better global score on the quality-of-life scale compared to the global score of individuals with subsidized regime (average: 66.21 vs. 53.8, respectively; p=0.00).”).

184 Ibid.
dimensions scores were higher in the contributory regime (translated from Spanish).”

A follow up study performed in 2010 to 2011 similarly found that individuals in the contributory regime scored higher across the board in quality of life measurements.186

In its decision on the merits of Duque’s case, the Inter-American Commission on Human Rights highlighted the particular vulnerability of HIV/AIDS positive individuals:

The Commission must emphasize the fact that persons living with HIV are in an especially vulnerable situation, given the characteristics of the illness, the medical treatment required, the exclusion and discrimination usually associated with it, and other factors. The lack of proper medical treatment normally injures affected persons’ physical, mental and moral integrity and usually leads to an early death.187

As noted in IACHR’s merits report, Mr. Duque was forced to move from the contributor-based social security health system to the subsidized system, whose benefits were 50% less,188 or find resources on his own to remain enrolled with his EPS provider to continue receiving treatment. The State’s claim that Mr. Duque has not, or would not, materially suffer because the State “has afforded Mr. Duque access to the social security health services system to receive the proper treatment for his illness,”189 fails to take into account the disparities in health outcomes and quality of life between the contributive and subsidized regimes outlined above. The State’s position not only discriminates against

---


187 Id. at ¶ 100.

188 IAHRC Report No. 5/14, Case 12,841, para. 18 (“Mr. Duque moved from having the benefits provided by the contributor-based social security health system —with which JOJG was enrolled while alive— to the subsidized system, whose benefits were 50% less.”).

189 IAHRC Report No. 5/14, Case 12,841, para. 30.
Mr. Duque based on his sexual orientation but compounds that discriminatory effect by failing to acknowledge his increased vulnerability as an individual living with HIV, relegating him to a subsidized regime that offers a significantly lower level of care, higher mortality rates, and decreased quality of life.

Under Article 10 of the American Convention’s Additional Protocol [Right to Health], “[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.” 190 Furthermore, “[i]n order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

[p]rimary health care, that is, essential health care made available to all individuals and families in the community; [e]xtension of the benefits of health services to all individuals subject to the State's jurisdiction;…[p]revention and treatment of endemic, occupational and other diseases;…[a]nd [s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.” 191 Furthermore, under Article 9 [Right to Social Security], “[e]veryone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence[. and i]n the event of the death of a beneficiary, social security benefits shall be applied to his dependents.” 192

Likewise, under Article 12 of the ICESCR, States Parties must “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” To achieve the “full realization of this right,” the “steps to be taken” by

190 American Convention Additional Protocol, supra note 8, at Art. 10.
191 Id.
192 Id. at Art. 9.
states must “include those necessary for…[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases…[and t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.”\(^{193}\) Under Article 9, States Parties must also “recognize the right of everyone to social security, including social insurance.”\(^{194}\) While an absolute right to social security is not explicitly recognized in the ICESCR, there is an implication that social security benefits are fundamental to the right to health for some populations, and that access to those benefits cannot be denied based on prohibited discriminatory grounds.

In its General Comment No. 14, the CESCR reinforces the ICESCR right to health as being the highest attainable standard of health. The Comment outlines the duty of states to ensure individuals’ health and how health entitlements should be guaranteed. For example, “[t]he right to health contains both freedoms and entitlements…[T]he entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”\(^{195}\) The Comment goes on to discuss the specific positive obligations of signatory states in facilitating these entitlements:

The obligation to fulfil (facilitate) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to fulfil (provide) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to fulfil (promote) the right to

\(^{193}\) ICESCR, supra note 5, at Art. 12.

\(^{194}\) Id. at Art. 9.

health requires States to undertake actions that create, maintain and restore the health of the population.\textsuperscript{196}

Both excerpts highlight states’ \textit{positive obligations} to provide health benefits and to facilitate access to those benefits. It is not enough for states to abstain from jeopardizing its citizens’ health or to simply allow private health services. Rather, states must actively facilitate the right to health, especially when individuals are “unable to realize the right themselves.” Furthermore, CESCR General Comment No. 19 interprets the right to social security as a state obligation to provide \textit{inter alia}, health systems and provision of benefits for families, children, spouses, and survivors. The Comment states eligibility should be determined in a transparent manner with emphasis in preventing de facto discrimination, a presumption against retrogressive measures, and special considerations for vulnerable groups.\textsuperscript{197}

Colombia has an obligation to provide health services under Articles 9 and 12 of the ICESCR. General Comment No. 19 reiterates this obligation and highlights the “\textit{particular importance of the right to social security in the context of endemic diseases such as HIV/AIDS}…” Mr. Duque is entitled to special protections because of his HIV status, and ensuring access to his accustomed high level of ART is exactly the sort of special consideration that his HIV status should afford him. Furthermore, Duque is entitled to the social security scheme of his deceased partner as both an adult dependent\textsuperscript{198} and as a survivor.\textsuperscript{199}

\textsuperscript{196} Id. at para. 37, emphasis in original).
\textsuperscript{197} UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para. 19.
\textsuperscript{198} Id. at para. 18
\textsuperscript{199} Id. at para. 21
Eligibility and applicability of social security programs is also subject to the principle of non-discrimination, including *de facto* discrimination as in the case of Duque.\textsuperscript{200} The Comment also emphasizes the need for non-discriminatory provision of social services to adult dependents and an obligation to assess the circumstances of both the provider and dependent.\textsuperscript{201} The Committee specifically addresses the situation of survivors such as Duque who were entitled to the social security or pension schemes of the breadwinner. The Comment explicitly states that “[s]urvivors or orphans must not be excluded from social security schemes on the basis of prohibited grounds of discrimination and they should be given assistance in accessing social security schemes, particularly when endemic diseases, such as HIV/AIDS, tuberculosis and malaria, leave large numbers of children or older persons without family and community support.”\textsuperscript{202}

Here, Colombia has an obligation not only to ensure that Duque, as a survivor, is not excluded from COLFONDOS benefits on discriminatory grounds, but also an obligation to give Duque special assistance because of his HIV status coupled with the fact that he has been deprived of *family support* due to his partner’s death and *community support* due to stigma stemming from his HIV status.\textsuperscript{203}

While a state might attempt to justify restrictions based on “maximum available resources,” this argument carries less weight when applied to disadvantaged and marginalized groups. As the Comment states:

\begin{itemize}
  \item \textsuperscript{200} *Id.* at para. 24 & 30.
  \item \textsuperscript{201} *Id.* at para. 18.
  \item \textsuperscript{202} *Id.* at para. 19 (emphasis added).
  \item \textsuperscript{203} See also Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, “Once the decision to establish a social pension is taken, States must ensure equal access to it. The principles of equality and non-discrimination require States progressively to ensure universal protection. These principles also require taking special measures to protect the most vulnerable segments of society as a matter of priority.” (Paragraph 58).
\end{itemize}
[E]ven where there is limited capacity to finance social security, either from tax revenues and/or contributions from beneficiaries, low-cost and alternative schemes could be developed to cover immediately those without access to social security, although the aim should be to integrate them into regular social security schemes.\textsuperscript{204}

The Comment goes on to state that integration into regular social security schemes may be accomplished by policies and legislation that facilitate the progressive inclusion of those excluded from access to social security. Furthermore, the Covenant also prohibits retrogressive measures in applying the right to social security, stating:

If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party” (Paragraph 42, emphasis added).

Here, Colombia has an obligation to enact policies to ensure that that Duque has access to his deceased partner’s benefits. The General Comments present strong language affirming Duque’s right to access COLFONDOS benefits as a part of his rights to health and social security, with special consideration due him because of his HIV status. Here, the most effective way to ensure that Duque receives the level and appropriateness of care needed to treat someone who is HIV+ would be to allow him access to the pension scheme to which he is entitled.

ii. Right to Life: Implications of Violations of Right to Health for Persons with a Life-Threatening Disease Such As HIV/AIDS

The American Convention protects the right to life through Article 4, which states that “[e]very person has the right to have his life respected…[a]nd no one shall be

\textsuperscript{204} \textit{Supra} note 191, at para. 51.
arbitrarily deprived of his life.”

ICCPR Article 6 mimics this language: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” While the right to life is most commonly recognized as a negative obligation of states, there is developing international and national commentary supporting the stance that the right to health is so intrinsically tied to the right to life that to deprive an individual of the former may constitute an illegal deprivation of the latter.

HIV, without consistent treatment, is a terminal illness, making deprivation of treatment the equivalent of a death sentence and a violation of the right to life. The state, by depriving Duque of access to appropriate, consistent, and effective health services, also threatens his life. As the CESCR’s General Comment No. 14 (2000) states:

The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to … life, non-discrimination, equality, the prohibition against torture... These and other rights and freedoms address integral components of the right to health.

Notably, in 2002, the Venezuelan Supreme Court addressed a very similar case as that found in Duque: López, Glenda and others versus the Venezuelan Institute for Social Security (IVSS). The case was filed as an amparo action, the Venezuelan equivalent of the título Constitutional action filed by Duque in Colombia. In López, a group of HIV-positive individuals requested the assurance of regular and consistent supply of triple-therapy, and other drugs and health expenses, as a constitutional right and as part of Venezuela’s obligation under international human rights treaties. The Court found for

---

205 American Convention, supra note 6, at Art. 4.
206 ICCPR, supra note 5, at Art. 6
207 See General Comment 154, supra 189, at para. 3.
petitioners and specifically addressed state failures to provide consistent and regular HIV treatment as a violation of the right to health and a threat to the right to life. The *amparo* was granted and extended to all HIV-positive persons covered by the IVSS.

iii. Intersectionality & the Effects of Discrimination on Particularly Vulnerable Groups

This is not the first time that the IACHR has acknowledged that special care must be taken when populations are subjected to multiple, intersecting forms of discrimination. In a 2011 decision, regarding victims of discrimination on the bases of their gender, ethnicity, displaced status, and their status as children, IACHR made clear that “the notion of intersectionality applies to this group of victims in view of the fact they suffer from many kinds of discrimination from a combination of causes….” Like gender, race, ethnicity, and sexual orientation, HIV+ status is often a label which leads to stigmatization and discrimination. Compounded with this, the health effects of being HIV+ makes this group especially vulnerable. In fact, HIV status is one form of stigmatization the General Assembly of the OAS has also directly recognized through a general resolution: “[P]eople living with HIV/AIDS face a series of obstacles, including stigmatization and discrimination from community and religious leaders, service providers, state agents, and even their own relatives; a lack of access to adequate medical insurance and health services . . . .” The European Court of Human Rights has also

---

210 Id at ¶ 379.
recognized the particular vulnerabilities of individuals living with HIV/AIDS and the prejudices they face. In the 2011 case of Kiyutin v. Russia, the ECtHR found that “people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.”

In 2013, the ECtHR decided I.B. v. Greece, noting that “HIV-positive persons have to face up to a whole host of problems, not only medical, but also professional, social, personal and psychological ones, and above all to sometimes deeply rooted prejudices even among the most highly educated people.” The ECtHR also explicitly noted in Kiyutin that an individual’s HIV status could be used to “reinforce[e] other forms of stigma and discrimination, such as racism, homophobia or misogyny.”

In Duque’s case, it is important to highlight that HIV+ status, in intersection with other categories such as an LGBT identity, can lead to even greater vulnerability and marginalization.

Several international and regional human rights bodies have also addressed the subject of intersectional discrimination. Among the General Comments promulgated by the UN Treaty Bodies, there have been a number of mentions of intersectional/multiple discrimination; however, one such General Comment is particularly applicable in the

---

214 Kiyutin, No. 2700/10 at para. 64; see also European Court of Human Rights, Judgment of July 24, 2012, B.S. v. Spain, No. 47159/08 (in French), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112459 (The ECtHR has also begun to incorporate similar notions of intersectionality into other decisions involving discrimination. In B.S. v. Spain, the ECtHR highlighted research provided by a third party intervener on “intersectional discrimination” and the ECtHR explicitly based its decision on the State party’s failure “to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute.” While the ECHR did not explicitly adopt the language of intersectionality in B.S. v. Spain, the decision represents a shift towards acknowledging the effect of multiple forms of discrimination—e.g., race, sex, and occupation—in the case of individual complainants.)
instant case. The CESCR’s General Comment No. 20 on “Non-discrimination in economic, social and cultural rights” clarifies language contained in Article 2, Paragraph 2 of the ICESCR.\footnote{CESCR General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), E/C.12/GC/20, July 2, 2009.} Article 2 states that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\footnote{International Covenant on Economic, Social and Cultural Rights, G.A. 993 UNTS 2, art. 2(2) (Dec.16, 1966).} General Comment 20 states, \textit{inter alia}, that individuals or groups that face discrimination on numerous prohibited grounds are deserving of special attention.\footnote{\textit{Supra} note 209, at ¶ 17.} According to the General Comment, “[s]uch cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.”\footnote{\textit{Id.}} Moreover, the CESCR specifies that the intersection of two prohibited grounds for discrimination might be considered to fall under the explicit category of “other status.”\footnote{\textit{Id.} at ¶ 27.}

As far back as 1992, UN officials have also routinely highlighted the discriminatory impact of stigma associated with HIV/AIDS, and the intersection of multiple forms of discrimination in particular.\footnote{See generally Final Report of Special Rapporteur - Discrimination against HIV-infected people or people with AIDS (July 28, 1992), paragraphs 55-58 (“All people living with illness or disability, including people with HIV and AIDS, are entitled to enjoyment of their fundamental human rights and freedoms without any unjustified restriction. . . . The obligation of States to ensure that all individuals within its territory are protected from discrimination in the enjoyment of their rights and freedoms includes protection against discrimination on the grounds of HIV infection or AIDS.”), available at \url{http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G92/127/97/PDF/G9212797.pdf}; Report of the Special Rapporteur, Paul Hunt, submitted in accordance with Commission resolution 2002/31 (Feb. 13, 2003) (“[R]ecognizing the compounding effects of multiple forms of discrimination, and documenting how discrimination and intolerance affect access to health and health care services.”), available at \url{http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/109/79/PDF/G0310979.pdf}.} Indeed, “Stigma and discrimination
associated with HIV/AIDS may also reinforce other prejudices, discrimination and inequalities related to gender and sexuality.”

And, the United Nations General Assembly has passed several resolutions including the "Declaration of Commitment on HIV/AIDS" (2001) and the “Political Declaration on HIV/AIDS” (2011), in which Member States have committed to eliminating all forms of discrimination and ensuring the full enjoyment of all human rights and fundamental freedoms of individuals living with HIV/AIDS.

Again, here, in the Inter-American system, indirect discrimination, or discrimination that has the effect of a discriminatory impact on a fundamental right—regardless of legislative intention, falls under the Convention’s definition of discrimination. While acknowledging that the direct discrimination Duque faced was based on his sexual orientation—and not directly because of his HIV status, the impact of the discrimination was greater because of his HIV status. A heterosexual person who is

---

221 Report of the Special Rapporteur, Paul Hunt (Feb. 16, 2004), paragraph 35 (“The result is that those affected may be reluctant to seek health and social services, information, education and counselling, even when those services are available. This, in turn, contributes to the vulnerability of others to HIV infection.”), available at [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf).


223 See Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 130, para. 112, 11, 141 (Sept. 8, 2005) (establishing that disparate impact even without proof of discriminatory intention is discrimination under Art. 24 (equal protection)); See also Permanent Council of the Organization of American States: Committee on Juridicial and Political Affairs, Presentation by Dr. Leonardo Hidaka, Meeting of March 9, 2010, pp. 4–6, OEA/Ser.G CAJP/GT/RDI-INF.19/10 available at [http://www.oas.org/dil/CAJP/GT-RDI-INF_19-10_eng.pdf](http://www.oas.org/dil/CAJP/GT-RDI-INF_19-10_eng.pdf) (summarizing the Organization of American State’s history on indirect discrimination); Organization of American States, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, Article 1.2a, June 17, 1999, AG/RES. 1608 (XXIX-O/99) (defining discrimination to include distinctions and restrictions with the effect of a discriminatory impact); Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, March 13, 2009, Principle II (defining discrimination to include distinctions with the effect of limiting enjoyment of rights). Dr. Hidaka also rightly argues that CEDAW Article 1 and Human Rights Committee General Comment No. 18, to which all American Convention parties are party to, also define discrimination in this way. See CEDAW art. 1; HRC General Comment No. 18.
HIV+ might have been able to access her/his deceased partner’s benefits, but because of the intersection of sexual orientation and HIV status, Duque—having been discriminating against because of his LGBT identity—now is also suffering the impact of the discrimination in terms of his fundamental rights to health and life due to his HIV status [i.e. because he has a stigmatizing and life threatening disease]. We urge the Court to view the circumstances of the case as a whole and to secure Duque’s rights to health and life—as well as his right to be free from discrimination—based on the intersection of his LGBT identity and HIV+ status.